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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ACW AIRWALL, INC., *et al.*,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that Judge Acosta, who has presided for more than three years over this highly complex mass disaster action in which a large portion of the 500 members of Puerto Rico's federal bar have participated, did not abuse his discretion under 28 U.S.C. § 455(a) by deciding that the unique circumstances of this case did not create an appearance of partiality on the Judge's part?

2. Whether the court of appeals was correct in deciding that Judge Acosta did not abuse his discretion under Section 455(a) in declining to treat his law clerks' family relationships as if they were his own and in concluding that those relationships, standing alone, did not create the appearance of the Judge's partiality that is required by the statute's language?

3. Whether the court of appeals was correct in deciding that Judge Acosta did not abuse his discretion when he held that Petitioners' motion for recusal was untimely because "the district court reasonably believed that the parties, certainly by the time of the Phase Two Trial, were aware, or should have been aware, of the relationship involved"?

4. Whether the court of appeals was correct in deciding that Judge Acosta did not abuse his discretion in applying this Court's standard under Section 455(a) by declining to impose the draconian remedies of disqualification and mistrial?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. The Law Clerks' Family Relationships	2
B. Counsel Involved in This Litigation	4
C. The Phase One and Phase Two Trials	6
D. The Relevant Proceedings Below	7
REASONS WHY THE WRIT SHOULD NOT ISSUE	8
INTRODUCTION	8
I. THE FIRST CIRCUIT'S DENIAL OF PETITIONERS' MANDAMUS PETITION COMPORTS WITH THE LETTER AND SPIRIT OF SECTION 455(a), AS WELL AS WITH THE RULE AND REASONING OF *LILJEBERG*.	10
A. The Asserted Appearance of Partiality	12
B. The Proper Remedy	20
II. THE CHALLENGED DECISION WILL HAVE LITTLE OR NO PRECEDENTIAL SIGNIFICANCE IN OTHER SECTION 455(a) CASES, INASMUCH AS THE RESULT REACHED BY THE FIRST CIRCUIT WAS ENTIRELY DEPENDENT UPON THE COINCIDENCE OF A NUMBER OF UNIQUE, INTERRELATED FACTS THAT ARE UNLIKELY TO RECUR IN THIS, OR ANY REMOTELY SIMILAR, COMBINATION.	24
III. THE DISQUALIFICATION ISSUE IN THIS CASE—IN CONTRAST TO THAT IN *LILJEBERG*—DOES NOT TURN ON ANY UNSETTLED LEGAL QUESTIONS THAT MIGHT ARISE WITH ANY FREQUENCY UNDER SECTION 455(a).	26

IV. DESPITE PETITIONERS' HALF-HEARTED ALLUSION TO SOME CONFLICT AMONG THE CIRCUITS, THERE IS NONE REGARDING ANY MATTER HAVING ANY RELEVANCE TO THIS DECISION. 28

CONCLUSION 29

APPENDIX 1a

TABLE OF AUTHORITIES

CASES:	Page
In re Allied Signal. Inc., 891 f.2d 967 (1st Cir. 1989)	1
In re Allied Signal, Inc., 891 F.2d 974 (1st Cir. 1989)	1
In re Cement Antitrust Litigation, 688 F.2d 1297 (9th Cir. 1982)	28
In re United States, 666 F.2d 690 (1st Cir. 1981)	9,12
Liberty Lobby, Inc. v. Dow Jones & Co., Inc., 838 F.2d 1287 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988)	28
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988)	*passim*
Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989)	28
Public Utilities Comm'n v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952)	11
United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986)	28

STATUTES, LEGISLATIVE REPORTS, AND RULES:	
28 U.S.C. § 455(a)	*passim*
28 U.S.C. § 455(b)	28
88 Stat. 1609	12
H.R.Rep. No. 1453, 93rd Cong., 2d Sess. 1 (1974)	12
Rule 60(b), Federal Rules of Civil Procedure	22
Rule 10(a) and (c), Revised Rules of the Supreme Court of the United States	8

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Plaintiffs' Steering Committee (PSC), appointed to represent the interests of all Plaintiffs in the San Juan Dupont Plaza Hotel Fire Litigation (the real parties in interest herein), opposes the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The Opinions of the United States Court of Appeals for the First Circuit denying the petitions for writ of mandamus are reported at 891 F.2d 967 (1st Cir. 1989) and 891 F.2d 974 (1st Cir. 1989), and appear at Pet.App. 1a-13a and 14a-18a, respectively. The Petition appears to challenge only the Opinion ap-

pearing at 891 F.2d 967, which upheld Order No. 218 of the United States District Court for the District of Puerto Rico, In the Matter of the Motion Requesting Recusal, which appears at Pet.App. 29a-57a.

STATUTE INVOLVED

This case involves 28 U.S.C. § 455(a) (hereinafter "Section 455(a)"), which is reproduced in its entirety at Pet.App. 120a-121a.

STATEMENT OF THE CASE

The San Juan Dupont Plaza Hotel Fire Litigation[1] grows out of a devastating fire that occurred on December 31, 1986. The first fire-related lawsuit was filed five days later and was assigned to District Judge Raymond L. Acosta. Subsequently, cases filed in California, Connecticut, New Jersey, and New York were transferred to the District of Puerto Rico by the Judicial Panel for Multidistrict Litigation. From the outset, Judge Acosta managed the case firmly, pressing all parties to keep to the straight and narrow goal of bringing this litigation to a swift and just conclusion.

A. The Law Clerks' Family Relationships

After Judge Acosta had presided over this litigation for more than two years, Petitioners alleged that certain family relationships between Judge Acosta's two law clerks and members of the Puerto Rican federal bar created an "appearance of partiality" attributable to Judge Acosta requiring his disqualification under Section 455(a). These relationships were:

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[1] *In re San Juan Dupont Plaza Hotel Fire Litigation*, MDL-721.

(1) David Indiano, a member of the PSC, is now a partner of William Graffam in the firm of Jimenez, Graffam & Lausell. The latter is the brother of Richard Graffam, one of Judge Acosta's law clerks at the time Petitioners moved to disqualify the Judge.

(2) Raul Vila, a partner in the firm of Fiddler, Gonzalez & Rodriguez, local counsel for Defendant San Juan Dupont Plaza Corporation, is the brother of Vilma Vila, also one of Judge Acosta's law clerks.

Petitioners contended that these relationships, *standing alone*, required Judge Acosta to disqualify himself and declare a mistrial.[2]

Judge Acosta has never attempted to keep the identity of his clerks a secret.[3] In fact, the clerks attended status conferences convened every month during the

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[2] The following relevant relationships also exist:

(1) Keith Graffam, brother of William and Richard, is a member of the firm that represents the insurers of the San Juan Dupont Plaza Hotel.

(2) Until April 1988, Vilma Vila's husband, Doel Quiñones, was an associate at the firm that represents three defendants.

Petitioners do not mention these relationships because they negate the assertion that Judge Acosta was inclined to favor any one side in this action or that there was any reasonable appearance that he might do so.

[3] Until July 30, 1989, his law clerks were Pedro Malavet, Richard Graffam and Vilma Vila. In July 1989, Pedro Malavet left to pursue private practice and a new clerk was hired to take his place. Richard Graffam also left to pursue private practice in October 1989. Vilma Vila is still employed by the district court.

litigation's pretrial stages. As a result, the clerks were well known to all counsel. Indeed, the names of the clerks were prominently mentioned in national and local news articles.

B. Counsel Involved in This Litigation

Most of the defendants retained counsel from the continental United States, who in turn became associated with local co-counsel in Puerto Rico. There are approximately sixty-three Puerto Rican lawyers and fifty-one Puerto Rican law firms representing defendants in the litigation. Of the twenty largest law firms in Puerto Rico,[4] twelve are involved in this lawsuit. Ten law firms from the continental United States have opened offices in Puerto Rico because of the magnitude of this case.

Defense attorneys banded together early on and have actively cooperated with one another from the beginning. A joint and cooperative working relationship established just days before the one-year statute of limitations expired on December 31, 1987, continues to this day. At the behest of their respective insurance companies, defendants established the Center for Public Resources for the stated purpose of fostering joint cooperation in defending against the claims. On December 9, 1987, defendants entered into an agreement entitled the Dupont Plaza Cooperation Agreement to carry out their joint defense and have been governed by it throughout this litigation. On May 8, 1989, approximately thirty-nine defendants en-

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[4] Only five law firms in Puerto Rico have over twenty-five attorneys; among the twenty largest law firms in Puerto Rico are firms with only eight or nine attorneys. Source: *Caribbean Business*.

tered into an agreement entitled the Joint Defense and Judgment/Settlement Sharing Agreement.[5] Local co-counsel are part of this cooperative effort and have participated actively and intimately in all phases of this dispute.

In January 1987, the district court appointed the Interim PSC. David Indiano was a member of that committee. At that time, he was an associate with Jimenez, Graffam & Lausell. Raul Vila's firm, Fiddler, Gonzalez & Rodriguez, also entered its appearance as counsel for the San Juan Dupont Plaza Corporation in January 1987. Shortly thereafter, the court requested applications for appointment to the permanent PSC. On February 19, 1987, Jimenez, Graffam & Lausell[6] nominated three members of the firm: Steve Lausell, William Graffam, and David Indiano. David Indiano was appointed to the permanent committee in Pretrial Order No. 2, filed on March 18, 1987. The appointment process was completely open. All parties were fully apprised of the court's deliberations and the applications, resumés, and pleadings are part of the record.

Most, if not all, of the Puerto Rican firms retained by stateside counsel to serve as local co-counsel frequently practice before Judge Acosta and the other district court judges in Puerto Rico. The federal bar in Puerto Rico is very small, and it is common knowledge that William Graffam is a partner in Jimenez, Graffam & Lausell and that Raul Vila is a partner in Fiddler, Gonzalez & Rodriguez. Three defense attorneys stated in their affidavits that they were

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[5] This agreement was voided in Pretrial Order No. 221.

[6] The application was signed by William Graffam.

aware of the sibling relationships of Judge Acosta's clerks early in this litigation.[7]

In Pretrial Order No. 29, filed on January 14, 1988, David Indiano was also appointed to the Discovery Committee, which consisted of attorneys representing both plaintiffs and defendants. Once again, the district court's application and selection process was completely open. Members of the Discovery Committee worked very closely with one another from January to December 1988. David Indiano communicated with committee members on Jimenez, Graffam & Lausell stationery. William Graffam's name appears second on that firm's letterhead.[8] In addition, David Indiano's address on the service list for this litigation always has been that of Jimenez, Graffam & Lausell.

C. The Phase One and Phase Two Trials

In March 1989, the Phase One Trial, commonly known as the "corporate veil" trial, began. It pitted the PSC and third-party plaintiffs ("TPP") against the hotel family defendants. The PSC and the TPP jointly prosecuted the case against the hotel owner-

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[7] *See* Opposition Appendix, pp. 1a-7a, Affidavits of Arturo Diaz, Gary Bostwick and Charles Cordero, which were attached as exhibits to the PSC's Opposition to Defendants' Motion for Disqualification, Recusal and Mistrial. Arturo Diaz is a member of the Trial Defense Liaison Committee and represents ADT; Gary Bostwick was principal defense attorney for the hotel ownership interests during the Phase One Trial; Charles Cordero, former president of the Puerto Rico Federal Bar Association, represents the San Juan Dupont Plaza Hotel's two insurance companies and employs Keith Graffam.

[8] Only three members of the Puerto Rican federal bar are named Graffam—the brothers Richard, William, and Keith. Theirs is apparently the only Graffam family on Puerto Rico.

ship defendants. The TPP consisted of the majority of the defendants who are now adverse to the PSC in the Phase Two Trial, some of whom signed the mandamus Petition.

During the Phase One Trial, the TPP members had daily contact with David Indiano and the other PSC members. Richard Graffam and Vilma Vila made regular appearances in court and sat at a specially designated table with a sign reading "Law Clerks" facing the attorneys in the courtroom's well. Voir dire lasted five days, during which the names of the law clerks were mentioned to each panel of venire persons an average of three to five times a day.[9] The Phase One Trial ended when settlement negotiations proved successful. Because of the settlement, allegiances immediately shifted and the TPP reverted to their original status as adversaries of the PSC.

The Court appointed a Defense Trial Liaison Committee to coordinate defense efforts and share all relevant information in the Phase Two Trial,[10] which began on June 27, 1989. Voir dire lasted seven days, during which the names of the law clerks again were mentioned to each panel of venire persons an average of three to five times a day.[11] Opening statements were presented from July 10 to July 14, 1989.

D. The Relevant Proceedings Below

Despite the passage of more than two years and the availability of full information, members of the Defense Trial Liaison Committee did not express any

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[9] Order No. 218 at 30 [Pet.App. 52a], n. 29.

[10] Pretrial Order Nos. 180 and 185.

[11] Order No. 218 at 30, n. 29.

concerns about Judge Acosta's law clerks until August 7, 1989. Petitioners filed their Motion for Disqualification, Recusal and Mistrial on August 14, 1989. Judge Acosta denied it on August 24, 1989. Six days later Petitioners filed a petition for a writ of mandamus with the United States Court of Appeals for the First Circuit which, following full briefing and oral argument, denied it on December 20, 1989 "for two separate, independent sets of reasons."[12]

REASONS WHY THE WRIT SHOULD NOT ISSUE

INTRODUCTION

As part of their ongoing attempt to derail the adjudication of this complex, mass disaster action, Petitioners ask this Court to conduct a third review of their recusal motion, claiming that both the district court and the court of appeals abused their discretion. Finding it impossible to present any recurring issues that are unsettled or otherwise "call for an exercise of this Court's power of supervision,"[13] Petitioners in effect ask the Court to function merely as a "super court of appeals," using its resources to do nothing more than scrutinize anew facts and circumstances that four federal judges unanimously found to be insufficient to compel recusal. They continue to contend that Judge Acosta abused his discretion by not immediately disqualifying himself under Section 455(a) and declaring a mistrial because of his law clerks' sibling relationships, and that the First Circuit abused its discretion in failing to reverse him on mandamus.

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[12] First Circuit's Opinion, Pet.App. 8a.

[13] Rule 10(a) and (c), Revised Rules of the Supreme Court of the United States.

They do this even though the court of appeals spelled out in painstaking detail the numerous reasons why it found Judge Acosta's decision to be " 'a rational conclusion supported by reasonable reading of the record.' "[14]

None of the purposes for which this Court ordinarily grants certiorari would be furthered by this case. The court of appeals' denial of Petitioners' mandamus petition conforms with both the letter and spirit of the only federal statute involved, Section 455(a). Moreover, notwithstanding Petitioners' strained attempt to fabricate an incongruity between the decision below and *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988), the First Circuit's carefully circumscribed opinion is perfectly consistent with this Court's pronouncement.

Furthermore, inasmuch as this case is entirely dependent upon the coincidence of a number of highly specific, interdependent facts that are unlikely to recur in the same, or any remotely similar, combination, the decision below is not likely to have any precedential impact in other Section 455(a) cases, making review by this Court inappropriate. And, even apart from its factual peculiarity, the disqualification issues present in this case—in contrast, for example, to the recusal issue raised in *Liljeberg*—do not present any unsettled legal questions that might arise with any frequency under Section 455(a). Finally, despite Petitioners' half-hearted reference to the decision below being "at odds" with other circuit court decisions (Pet. 12), there is absolutely no discernible conflict

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[14] Pet.App. 5a, quoting *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981); emphasis omitted.

among the circuits on any matter relevant to this case or, for that matter, any evidence whatsoever that the federal courts are experiencing any difficulty in administering Section 455(a) in any regard germane to this case.

I. THE FIRST CIRCUIT'S DENIAL OF PETITIONERS' MANDAMUS PETITION COMPORTS WITH THE LETTER AND SPIRIT OF SECTION 455(a), AS WELL AS WITH THE RULE AND REASONING OF *LILJEBERG*.

In a desperate attempt to convince the Court that this case is worthy of its attention, Petitioners pejoratively portray the decision below as a totally unprincipled, "pernicious precedent." (Pet. 14) The petition argues that this Court should review this case because the First Circuit has violated some absolute or universal ethical principle embedded in Section 455(a) that applies in all cases without regard to what their facts may be. Indeed, their claim seems to be that the court below committed reversible error by simply exercising discretion and looking at the facts and circumstances of the case before it.

Petitioners advance this startling theory without offering any supporting authority and without ever divulging what that Platonic Ideal of judicial behavior might be. Instead, they pepper their petition with verbal flourishes that denigrate the two courts below, but offer no illumination whatsoever. The reader is told that "[t]he decision below is fundamentally at odds with the standards of judicial ethics" (Pet. 7), embraces " 'situational ethics' " (Pet. 9), "rips Section 455 from its moorings" (Pet. 11), represents a "troubling . . . gloss" (Pet. 12), is "the first decision to deliberately skirt" the "ethical imperatives" set down by Congress and this Court (Pet. 15), and condones

a "knowing violation" by Judge Acosta, who they say "deliberately concealed the facts in this case" (Pet. 22 at n. 34).

In truth, this sound and fury signifies nothing of substance. The two courts below applied Section 455(a) according to its palpably discretionary character in the only plausible way they could—with reference to the facts and circumstances of the case before them. Knowing that certiorari is not likely to be granted on the basis of Petitioners' disagreement with the way four federal judges applied the facts to the statutory standard, they have chosen to assert that this Court must declare ethical "precepts" and "imperatives" that are "immutable" on all Section 455(a) motions. The Court should do no such thing. The decision below is entirely consistent with the common understanding of the application of Section 455(a) and the precedents under it and reflects a proper exercise of judicial discretion.

The First Circuit's separate and independent dispositions of the "appearance of partiality" and "proper remedy" questions are entirely consistent with the letter and spirit of the statute, and, insofar as *Liljeberg* even bears on this case, the decision below is harmonious with the rule and reasoning of that case. In fact, Judge Breyer's opinion for the court explained in great detail precisely why Judge Acosta's decision not to disqualify himself comports with *Liljeberg's* notion that " 'the administration of justice should reasonably appear to be disinterested as well as be so in fact.' "[15]

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[15] 108 S.Ct. at 2207, quoting *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 466-67, 72 S.Ct. 813, 822-23, 96 L.Ed. 1068 (1952).

A. The Asserted Appearance of Partiality

There are competing, but equal, policies ingrained in Section 455(a).

> The first and most obvious . . . is that the courts must not only be, but must seem to be, free of bias or prejudice. . . . A second and less obvious policy is that a judge once having drawn a case should not recuse himself on unsupported, irrational, or highly tenuous speculation; were he or she to do so, the price of maintaining the purity of appearance would be the power of litigants or third parties to exercise a negative veto over the assignment of judges.[16]

Moreover, although the 1974 amendments to Section 455(a) served " 'to broaden and clarify the grounds for judicial disqualification,' "[17] they did not alter the fact that the decision of a district judge to recuse or not to recuse is still largely a matter of his or her discretion.[18] As the legislative history of Section 455(a) makes clear, the issue of disqualification remains "a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion."[19]

In *Liljeberg*, this Court affirmed that disqualification is required under Section 455(a) only if a reasonable person, informed of all the relevant facts,

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[16] *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

[17] 108 S.Ct. at 2197, quoting 88 Stat. 1609.

[18] H.R.Rep. No. 1453, 93rd Cong., 2d Sess. 1 (1974).

[19] *Id.*

would harbor doubts about the impartiality of the judge.[20] For all of their invocations of *Liljeberg*, Petitioners have not cited a single genuine inconsistency between the rule and reasoning of that case and the manner in which the First Circuit assessed Judge Acosta's exercise of discretion on the appearance of partiality issue.[21]

In fact, the court below simply applied the "reasonable person" standard as *Liljeberg* mandates, and "assess[ed] all the facts and circumstances" as the legislative history of Section 455(a) requires. In doing so, the First Circuit carefully specified two "general factors," as well as "three special features of this

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[20] 108 S.Ct. at 2202-03.

[21] This is not surprising, since the matter decided by the court below—whether or not the relevant facts create an appearance of partiality on the judge's part—was not even before this Court in *Liljeberg*. Since both lower courts in *Liljeberg* already had agreed that Judge Collins' relationship with Loyola University definitely "gave rise to an appearance of impropriety," 108 S.Ct. at 2198, this Court had to decide only the issue of "scienter" (that is, whether the acknowledged appearance of partiality could be vitiated by Judge Collins' apparent ignorance of his actual relationship with the plaintiff) and what the appropriate remedy would be. *Id.* at 2202, 2203

This distinction highlights the incongruity of comparing this case with *Liljeberg*. *Liljeberg's* appearance-of-partiality analysis turned on whether a single fact (the judge's lack of knowledge of his actual relationship with a party) properly could obviate the violation of Section 455(a). In this case, however, the court of appeals' appearance-of-partiality equation involved no less than five specifically delineated factors, all of which—unlike Judge Collins' undisclosed state of mind—are " 'objectively ascertainable' " by a knowledgeable observer. *Id.* at 2202.

case,"[22] which, in its view, "militate against our finding an appearance of partiality that requires disqualification."[23]

The first general factor deemed significant by the court of appeals is that, even in an ordinary case, a law clerk's family relationship is a "relatively weak and remote" basis for concluding that the judge is incapable of maintaining his own impartiality.[24] Section 455(a) addresses " 'judge[s]' . . . not clerks," and "[b]oth bench and bar . . . recognize that judges, not law clerks, make decisions."[25] The court quite properly held that it is neither necessary nor desirable for judges to recuse themselves automatically under Section 455(a) because of matters relating entirely to their law clerks or other staff members. If judges were required to treat their law clerks' family relationships as they would treat their own, the court noted, the present system in which "individual judges . . . enjoy considerable independence in deciding precisely how to use their clerks" would have been sacrificed in favor of a system in which judges would be forced "to find and deal in advance with all 'suspect' relationships of staff and parties . . . ."[26]

The First Circuit properly eschewed wholesale, indiscriminate application of Section 455 to law clerks'

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[22] Petitioners' suggestion that the court of appeals decided the "appearance of partiality" question based "on an analysis of three factors" clearly mischaracterizes the court's opinion. Pet.App. 8a.

[23] *Id.*

[24] *Id.* at 7a.

[25] *Id.* at 7a-8a.

[26] *Id.* at 8a.

family relationships, choosing instead to tailor its narrow pronouncements to the law clerks' family relationships in this case. Given the unique situation that the First Circuit faced, it would have been a gross overreaction for the court below to have used the situation involving Graffam and Vila as a pretext for " 'bureaucratizing' the law clerk system," including the necessary concomitant of expanding all present judicial disclosure procedures to encompass the family and financial relationships of the estimated 2200 law clerks currently serving in the federal court system.[27] Petitioners' insistence that this Court do so (Pet. 19) must be rejected.

The second general factor found to militate against finding an appearance of partiality in this situation is that it is a "large, complex, and time consuming" case.[28] Contrary to Petitioners' disingenuous statement that the court of appeals "decided that rules of judicial propriety can vary from case to case" (Pet. 9), the First Circuit did not simplistically adopt a separate, less stringent "appearance of partiality" standard for complex cases. Its reference to size and complexity was meant only as an acknowledgement that, in a case like this, an appellate court should be cautious about second-guessing a district judge's decision on how best to use law clerks, given "the need for judicial management by the district court."[29] This common sense proposition certainly is in no way contrary to *Liljeberg*, which discussed the complexity of litigation not in terms of the reasonable person's per-

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[27] Source: Administrative Office of the Courts.

[28] Pet.App 8a.

[29] *Id.*

ception of partiality, but in terms of the "unique difficulties" that judges often have, but must overcome, in discovering "any personal or fiduciary financial interest *they* may have in cases over which they preside."[30]

Also purely a matter of common sense is the First Circuit's reference to this litigation's location as a special feature that would lead a reasonable, informed observer to reject the notion that the judge appeared to be partial. Again, Petitioners would have the Court believe that the First Circuit was manufacturing a test that allowed a judge "to alter his ethical standards" (Pet. 14) for judging appearances of partiality based simply on geography. That is a gross distortion of Judge Breyer's reasoning. To the contrary, the court of appeals' reference to the location of this action illustrates how closely linked the court's analysis is to the "reasonable person" standard approved in *Liljeberg*.

Obviously the hypothetical reasonable person must have some level of information, the power to reason, and the ability to use common sense, although Petitioners' model is a person who knows nothing, cannot reason, and totally lacks common sense! The First Circuit quite properly recognized that "the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality."[31] Having said that, the court noted that "the federal bar in Puerto Rico is small; fewer than 500 lawyers practice in the federal district

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[30] 108 S.Ct. at 2203, n. 9; emphasis added.

[31] Pet.App. 8a-9a.

court."[32] Next, the First Circuit observed that "[t]he number of Puerto Rican lawyers involved in this case is large."[33] These premises led the court to the common sense conclusion that "[t]he risk that a law clerk, or some other staff member, will have a brother or sister or some other family member involved in this case is a likely concomitant of trying such a large case in such a small district."[34] This analysis is certainly fair comment for an appellate tribunal considering a mandamus petition alleging an abuse of discretion. Far from chiseling out insidious principles that undermine *Liljeberg*, such as the "situational ethics" that Petitioners pejoratively accuse the First Circuit of adopting, these observations simply aid the appellate court in appraising the rationality of the district court's conclusion about what a reasonable person would think.

Toward the same end, the First Circuit noted that "the effective management of this highly complex litigation benefited from, if it did not absolutely require, the services of the particular law clerks in question."[35] Again, Petitioners see this as setting a dangerous precedent:

> Under the First Circuit's test, the scope of Section 455 would be dictated by an assessment of the desirability of the judge's stated objectives, not the means by which he attempted to achieve that end. That approach would turn Section 455 on its head. (Pet. 15)

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[32] *Id.* at 9a.

[33] *Id.*

[34] *Id.*

[35] *Id.*

What their ominous spectre ignores is that the First Circuit's observation as to Judge Acosta's "need" for these law clerks was based on their unique status as "career clerks."[36] That status logically carried with it twin benefits: (1) they had extensive experience working for Judge Acosta and (2) there was more than the usual insulation from the potentially biasing influence of possible past or future employment with any of the law firms involved. Viewed in context, the First Circuit's observation that Judge Acosta's need for these particular law clerks "was somewhat special and likely to have been seen as such"[37] is proper commentary. It is not—as Petitioners depict it—a broad pronouncement that in Section 455(a) cases the end justifies the means. Moreover, the remark is so closely linked to a special fact of this case—the clerks' career status—that it is difficult to imagine any other court applying it so broadly and carelessly that there is any substance to Petitioners' assertion that it "would turn Section 455 on its head."

Not surprisingly, Petitioners ignore the last special feature of this case identified by the First Circuit—the untimeliness of Petitioners' request for recusal under Section 455(a). Yet, this is another example of how closely linked the court's analysis is to the "reasonable person" standard approved in *Liljeberg* and how unworthy this case is of further review. The First Circuit observed:

> [T]he record suggests that the district court reasonably believed that the parties, certainly by the time of the Phase Two trial, were

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[36] *Id.*

[37] *Id.*

> aware, or should have been aware, of the relationships involved.[38]

This led the court to conclude:

> Yet, for more than two years during which Richard Graffam and Vilma Vila participated in these proceedings, no one objected. This fact suggests that, until recently, those associated with the case did not see the "sibling relationship" as carrying with it a threat to the impartiality of the proceedings; and that fact helps to support the district court's conclusion that a "knowledgeable" objective observer would not have seen in the relationship a significant indication of partiality.[39]

This observation—that, in essence, if those parties who had been involved in this case every day for two years saw nothing wrong with the sibling relationships, then a reasonable observer hardly could be expected to react differently—simply ascribes rationality to the district court's express conclusions that Petitioners' motion did not demonstrate an appearance of partiality and was untimely. Moreover, linking the movants' failure to object for more than two years to what a reasonable observer would likely conclude is consistent with *Liljeberg's* reference to the "particular importance" that would be attached to any "neglect or lack of due diligence by [the movant]."[40]

The First Circuit's careful review of these factors and its measured assessment of their import in the

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[38] *Id.* at 10a.

[39] *Id.*

[40] 108 S.Ct. at 2204, n. 11.

context of Section 455(a) belie Petitioners' suggestion that it fashioned a "pernicious precedent." Petitioners' characterization of the First Circuit's opinion as a dereliction of that court's function that lends credence to the notion "that judicial propriety can vary from case to case" is grossly misleading and a regrettable distortion of that court's work product designed to draw attention to this case. The standards set by Congress and this Court compelled the court below to focus on the circumstances of this case and led it to conclude that Judge Acosta had properly exercised his discretion under Section 455(a).

B. The Proper Remedy

In addition to concluding that there was no appearance of partiality, the First Circuit independently determined that Petitioners would not be entitled to retrospective relief in the form of a mistrial "even were the 'appearance of partiality' line drawn differently."[41] The reasoning employed by the court of appeals in reaching this conclusion is consistent with the remedial considerations described in *Liljeberg* and further review by this Court is unnecessary.

In *Liljeberg*, after concluding that Judge Collins' relationship with Loyola University created an appearance of partiality whether he remembered that relationship or not, this Court stated, "There need not be a draconian remedy for every violation of Section 455(a)."[42] It went on to note:

> Congress has wisely delegated to the judiciary the task of fashioning the remedies that

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[41] Pet.App. at 13a.

[42] 108 S.Ct. at 2203.

> will best serve the purpose of the legislation. In considering whether a remedy is appropriate, we do well to bear in mind that in many cases—and this is such an example—the court of appeals is in a better position to evaluate the significance of a violation than is this Court. Its judgment as to the proper remedy should thus be afforded our due consideration.[43]

The factors considered by the Court were "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process."[44]

In the instant case, the First Circuit expressly considered each of these factors and explained precisely why they "would nonetheless prevent us from setting aside any previous judicial action."[45] Petitioners' assertion that its analysis "distorted" these factors is largely predicated on their own "distorted" reading and incomplete depiction of both *Liljeberg* and the decision below.

For example, Petitioners contend that the prospect of repeating the portion of the Phase Two Trial that preceded the recusal motion could not constitute an "injustice to the parties" that outweighed the need to relieve Petitioners of "the result of a proceeding that has been infected with an appearance of partiality." (Pet. 20) What the First Circuit actually con-

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[43] *Id.*

[44] *Id.* at 2204.

[45] Pet.App. 12a.

cluded is that, although "the loss of time and money" inherent in granting mistrial would be unjust, the greater injustice" would lie "in putting the [Phase One] settlement agreements at risk."[46] With seeming innocence Petitioners insist that they "have no standing or desire to overturn" the settlements. (Pet. 20) This response simply begs the question; if a mistrial were declared, there would be no way to prevent parties to the more than fifty settlement agreements executed thus far from seeking relief under Rule 60(b), jeopardizing everything accomplished thus far. Opening that Pandora's box at this late stage clearly would further neither the interests of justice, nor the much favored policies of settling lawsuits and achieving litigation finality.

Furthermore, in criticizing the First Circuit's assessment of "the risk that the denial of relief will produce injustice in other cases," Petitioners quote *Liljeberg* for the apparent proposition that retrospective relief should be freely granted as a way of encouraging judges or litigants in other cases " 'to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered.' " (Pet. 21) What Petitioners ignore is this Court's very next statement in *Liljeberg*—retrospective relief is not appropriate when the party seeking it "did not make a timely request for relief . . . ."[47] Clearly, this is a critical difference between this case and *Liljeberg*; granting retrospective relief under these circumstances would have the undesirable effect of encouraging precisely the type of delay that has marked these proceedings. Any delay in raising potential Section

[46] *Id.* at 12a.

[47] 108 S.Ct. at 2206.

455(a) problems—whether caused by the judge's failure to disclose at an early stage of the litigation, as in *Liljeberg*, or by an aggrieved party's lack of due diligence, as in this case—must not be tolerated. To permit tardy motions seeking recusal encourages parties to defer making Section 455(a) motions until their fortunes have soured.

Struggling to find an inconsistency with *Liljeberg*, Petitioners conveniently neglect to mention a critical passage in this Court's opinion, which justified a limited deviation in that case from the normal practice of denying late requests for retrospective relief—"the entire delay is attributable to Judge Collins' inexcusable failure to disqualify himself" once he *actually* knew of facts creating an appearance of partiality.[48] Inasmuch as the First Circuit properly concluded—in a portion of the opinion not criticized by Petitioners—that Judge Acosta had a rational basis for finding them responsible for their motion's tardiness, it clearly would have been improper for the court below to apply the *Liljeberg* exception in considering the "public confidence" factor. Since the First Circuit's analysis of the question of "proper remedy" is entirely consistent with *Liljeberg*, particularly in light of that court's considerable familiarity with this case,[49]

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[48] *Id.* at 2207.

[49] *See*, e.g., *In re Recticel Foam Corporation*, 1st Cir. No. 88-1204; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-1961; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-2016; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-1436; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-2033; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-8029; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 88-2149; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No.

Petitioners have not presented any sound reason for this Court to grant further review.

II. THE CHALLENGED DECISION WILL HAVE LITTLE OR NO PRECEDENTIAL SIGNIFICANCE IN OTHER SECTION 455(a) CASES, INASMUCH AS THE RESULT REACHED BY THE FIRST CIRCUIT WAS ENTIRELY DEPENDENT UPON THE COINCIDENCE OF A NUMBER OF UNIQUE, INTERRELATED FACTS THAT ARE UNLIKELY TO RECUR IN THIS, OR ANY REMOTELY SIMILAR, COMBINATION.

To attract this Court's attention, Petitioners attempt to cloak this case with broad, dramatic principles suggesting it presents issues of great ethical import. Nothing could be further from the truth. The First Circuit's decision is entirely and expressly fact-dependent. It does not purport to set down any rules regarding Section 455(a), but rather rests exclusively on the unique facts and circumstances of the San Juan Dupont Plaza Hotel Fire Litigation. And, compounding the uniqueness of this decision, the facts on which it rests are so peculiar and so interrelated that it is difficult to imagine how it could be applied outside of its narrow context.

The San Juan Dupont Plaza Hotel Fire Litigation is among the largest cases ever litigated in American legal history, involving thousands of plaintiffs, defendants, and attorneys. It is certainly the largest, most complex case ever brought in Puerto Rico. Although Puerto Rico's population exceeds that of 24

88-2154; *In re Dupont Plaza Hotel Fire Litigation*, 1st Cir. No. 89-1072. These are among the various appeals and mandamus petitions that have been before the First Circuit during the course of this litigation.

states, its federal bar is among the smallest, if not the smallest, in the federal court system. Because membership is limited to lawyers who are fluent in written and spoken English, there are fewer than 500 members in the Puerto Rican federal bar.

In addition, there have been numerous and specific testimonials regarding which Petitioners' attorneys knew about the law clerks' family relationships and when they possessed that knowledge. Only three members of the Puerto Rican federal bar are named Graffam—the brothers Richard, William, and Keith. Indeed, there apparently is only one Graffam family on the entire island. The relationships among the Graffam brothers and, for that matter, Vilma Vila and her brother Raul were widely known within the Puerto Rican federal bar. And, both stateside and Puerto Rican defense counsel worked together intimately and exchanged information for more than two years before anyone raised the Section 455(a) issue.

The First Circuit thought a number of other facts underscored the uniqueness of this case. These include: Judge Acosta employs career law clerks and both Richard Graffam and Vilma Vila served in that capacity; the press identified Richard Graffam and Vilma Vila as Judge Acosta's law clerks; William Graffam, who is a principal in the same law firm as PSC Member David Indiano, has had little involvement in this case; and all but one of the 49 original defendants who petitioned the First Circuit were represented by local counsel, yet only six of them executed affidavits disavowing knowledge of the sibling relationships until after the Phase Two trial began.[50]

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[50] Pet.App. 10a, 13a.

The First Circuit took great care to analyze these facts from the standpoint of a reasonable observer. Since its opinion eschewed broad rules in favor of restrained, fact-dependent observations befitting the case's unique character, certiorari should not be granted.

III. THE DISQUALIFICATION ISSUE IN THIS CASE—IN CONTRAST TO THAT IN *LILJEBERG*—DOES NOT TURN ON ANY UNSETTLED LEGAL QUESTIONS THAT MIGHT ARISE WITH ANY FREQUENCY UNDER SECTION 455(a).

In *Liljeberg*, this Court was able to settle an important legal question on which the disqualification issue turned—whether or not a decision under Section 455(a) depends on what the judge knew about the disqualifying fact and when he knew it. In so doing, this Court resolved the question for all Section 455(a) cases.

There is no comparable unsettled legal issue on which this case turns; nor is there any legal issue that is framed in a way that makes its resolution a meaningful part of Section 455(a) jurisprudence. In fact, this case does not turn on any single, narrowly defined issue, much less one that requires this Court's attention.

Nor is there any evidence of difficulties arising from relationships between judicial clerks and third persons that bear on the policies reflected in Section 455(a). Congress has not seen fit to legislate on the subject, cases are virtually nonexistent, and Petitioners do not cite anything worthy of note. Moreover, as Judge Breyer observed in his opinion for the court below:

> [J]udges are fully capable * * * of taking account of whatever "bias" having a brother

> in a plaintiff's law firm might bring to a clerk. Furthermore, individual judges must enjoy considerable independence in deciding precisely how to use their law clerks, for "bureaucratizing" the law clerk system with too many rules and regulations or too much appellate court supervision would threaten the flexibility that permits that system to speed the resolution of cases.[51]

Despite Petitioners' rhetoric and repeated ethical incantations, there does not appear to be any problem that justifies the grant of certiorari in this entirely fact-dependent case. Should the Court believe that the relationships between clerks and third persons and their relevance to federal judges warrants further attention, reference to Congress or to the appropriate Advisory Committees of the Judicial Conference for comprehensive study and possible rulemaking proposals would make far more sense than highly interstitial attention by this Court in a non-replicable case like this one.

In the final analysis, Petitioners' quarrel with the decision below is not really with any *rule* promulgated by the First Circuit, because it did not say anything that even purports to be a rule; rather, their quarrel is with the result reached by that court through careful consideration of factors and by following a process that already has been approved by this Court. That is not enough to warrant certiorari.

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[51] *Id.* at 8a.

IV. DESPITE PETITIONERS' HALF-HEARTED ALLUSION TO SOME CONFLICT AMONG THE CIRCUITS, THERE IS NONE REGARDING ANY MATTER HAVING ANY RELEVANCE TO THIS DECISION.

Only once in their petition do Petitioners even hint that this Court should review this case in order to resolve a conflict among the circuits. They do it by obliquely implying that the First Circuit is "at odds" with "other circuit court decisions" (Pet. 12) in even considering size and complexity as relevant factors under Section 455. The only case they cite—*In re Cement Antitrust Litigation*[52]—is patently distinguishable. It arose under Section 455(b), which mandates automatic disqualification according to a fixed formula; Section 455(a) is purely discretionary, and involves consideration of any factor that might be deemed significant by a knowledgeable observer.

Not only is the First Circuit's decision not inconsistent with any other relevant court of appeals opinion, it is actually in accord with every other appellate decision that bears on the remedy issue, namely *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*,[53] *United States v. Murphy*,[54] and *Parker v. Connors Steel Co.*[55] Even the one case involving a law clerk in which the circumstances led to recusal after a finding of an "appearance of partiality"—*Parker v. Connors Steel*

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[52] 688 F.2d 1297 (9th Cir. 1982).

[53] 838 F.2d 1287, 1301-02 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988).

[54] 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986).

[55] 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989).

Co.—is so readily distinguishable that Petitioners did not even bother to mention it, let alone disagree with the First Circuit's treatment of it.

CONCLUSION

For the foregoing reasons, this Court should decline to issue the requested writ of *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MASTER FILE: MDL-721

IN RE:

SAN JUAN DUPONT PLAZA HOTEL FIRE LITIGATION

THIS DOCUMENT RELATES TO:

ALL CASES

DECLARATION OF ARTURO DIAZ

COMES NOW Arturo Diaz, of legal age, married, attorney-at-law and resident of San Juan, Puerto Rico, and hereby states under penalty of perjury as follows:

1. I am counsel for ADT Diversified Services, Inc. ("ADT") in the San Juan Dupont Fire Litigation.

2. Before the commencement of this litigation, I knew that the Court's Law Clerk, Mr. Richard Graffam, was the brother of Mr. William Graffam, a name partner in the law firm of Jimenez, Graffam & Lausell (the Graffam firm).

3. At the conference held on Monday morning, August 7, 1989, where I participated as a member of the Court appointed Defendant's Liaison Committee, I became aware that Richard Graffam, in his role as Law Clerk, has actively participated throughout the case, and has given fre-

quent advice to the Court, as a member of the Court's team. Prior to that time I knew that Mr. Richard Graffam actively participated as a Law Clerk in the case only after Mr. Pedro Malavet ceased in his position as Law Clerk.

4. While I knew the relationship between Mr. Richard Graffam and Mr. William Graffam and while I recently learned in a newspaper article that Mr. David Indiano was a partner of Mr. William Graffam, I never knew or suspected that either the Graffam firm or Mr. William Graffam had any financial interest, let alone a considerable one, in the outcome of the litigation, since I thought Mr. Indiano's cases were his own. Moreover, I was not aware of Richard Graffam's active participation in the case as Law Clerk.

5. During opening statements I saw Mr. William Graffam sitting in the Courtroom in the area designated for the PSC. I also observed him talking to several members of the PSC. It is my recollection that while Mr. William Graffam was sitting in the Courtroom at the PSC's designated area, Mr. Richard Graffam was also sitting in the Courtroom in the designated area for Law Clerks.

6. During a break, following Mr. William Graffam's appearance in Court, and because I became concerned about his presence in Court at the same time that his brother, Mr. Richard Graffam, was also in court performing his duties as Law Clerk, I approached Mr. William Graffam and had a conversation with him. As a result of the conversation that ensued, I became aware that both the Graffam firm and Mr. William Graffam, as a partner in the Graffam firm, were legal representatives of plaintiffs in this litigation and therefore both the Graffam firm and Mr. William Graffam had a substantial economic interest in the outcome of the litigation. Also, from my conversation with Mr. Graffam, I became aware that any fees to be received by the Graffam firm in this litigation were on a contingency basis. Immediately upon becoming aware

of this situation, I informed the same to Mr. Steven Glickstein, who is also counsel for ADT in this litigation.

7. In view of the familial relationship between Richard and William Graffam, the fact that Richard Graffam has actively participated as a Law Clerk throughout this litigation, the fact that Mr. David Indiano is a partner of Mr. William Graffam, the fact that the Graffam firm and Mr. William Graffam as a partner in the firm represent plaintiffs in the case, the fact that both the Graffam firm and Mr. William Graffam have a considerable financial interest in the outcome of this litigation and the fact that such financial interest is contingent upon the final outcome, at the conference held on August 7, 1989, the Defendants' Liaison Committee, on behalf of all defendants, requested that Mr. Richard Graffam be isolated for further participation in these proceedings. Such request was taken under advisement by the Court. However, on Tuesday August 8, 1989, I was informed that Mr. Richard Graffam was still sitting in the Courtroom in the area designated for the Law Clerks and that the Court periodically conferenced with him during the proceedings.

8. In view of the foregoing, it is clear that the impartiality of the Court might reasonably be questioned and therefore a mistrial and recusal of the trial Judge is the only acceptable solution to the undersigned and its client.

I declare under penalty of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. Sec. 1746.

In San Juan, Puerto Rico this 14th day of August, 1989.

/s/ Arturo Diaz
ARTURO DIAZ

DECLARATION OF GARY L. BOSTWICK

I, Gary L. Bostwick, declare as follows:

1. I am an attorney at law, licensed to practice before for [*sic*] this Court, and a partner in the law firm of Bostwick & Ackerman, a Professional Corporation, and counsel for several defendants herein. I know the following facts of my own personal knowledge and if called and sworn as a witness could testify competently thereto.

2. I have been asked to state my recollections regarding my knowledge of the relationship of one of the law clerks of this Court to a law firm that represents plaintiffs in this matter.

3. I have a recollection of one of the attorneys representing one of the Dupont Defendants talking to me about this matter. I do not recall who the attorney was. However, I specifically remember being told that Mr. Richard Graffam, a law clerk to this Court, was the brother of an attorney with the firm of Jimenez, Graffam & Lausell. I also knew that David Indiano, a member of the Plaintiffs' Steering Committee, was a partner in that firm.

4. I recall discussing the matter for a few moments. My impression was that several attorneys representing Dupont Defendants knew of this relationship.

5. I did not find anything worthy of note about the relationship or the information. I do not recall deliberating or considering taking any action because of the information.

6. I do not have a specific recollection of the date that the information became known to me. However, it occurred during one of my trips to San Juan and my best estimate is that it occurred some time between August, 1988 and February, 1989. I am certain that it occurred before Phase I of the trial began on March 15, 1989.

I declare under penalty of perjury under the laws of this United States of American that the foregoing is true and correct and was executed on August 14th, 1989 at Santa Monica, California.

/s/ Gary L. Bostwick
Gary L. Bostwick

SWORN STATEMENT

I, CHARLES A. CORDERO, of legal age, married, resident of San Juan, Puerto Rico do hereby swear as follows:

1. That my name and personal circumstances are those stated above.

2. I am the attorney of record in the San Juan Dupont Plaza Hotel Fire Litigation, MDL 721, representing codefendant, American International Insurance Company of Puerto Rico and the Insurance Company of the State of Pennsylvania.

3. Keith Graffam is an associate of my offices and has actively been involved in this litigation as my assistant.

4. I have been aware, since before the beginning of the litigation, that William A. Graffam is a partner of Jiménez, Graffam & Lausell and that he is the brother of both Richard Graffam, Judge Acosta's law clerk, and Keith Graffam of my office. I am also aware that David C. Indiano is William A. Graffam's partner and that the former is a member of the PSC.

5. I am the former President of the Federal Bar Association, Puerto Rico chapter and am aware that there is a relatively small number of Civil Federal Bar practitioners in San Juan Puerto Rico. Most civil practitioners who are active in the Federal Bar know each other and information among them concerning who the judge's law clerks are is common knowledge.

6. To my understanding it was common knowledge that Richard, Keith, and William are brothers and that Richard was one of the law clerks working in this litigation for Judge Acosta. This was discussed on various occasions among both local and stateside practitioners in this case.

7. Knowing all the above facts, I never felt there was any reasonable basis for believing that the impartiality of

Judge Acosta could be questioned and never considered filing any motions for recusal and/or mistrial based on any of the facts described above.

In San Juan, Puerto Rico, this 15th day of August, 1989.

/s/ Charles A. Cordero
Charles A. Cordero

Affidavit No. 742.

SWORN AND SUBSCRIBED to and before me by Charles A. Cordero, of the above stated circumstances, personally known to me in San Juan, Puerto Rico, this 15th day of August, 1989.

/s/ (illegible)
NOTARY PUBLIC

SEAL: DARIO RIVERA CARRASQUILLO
ABOGADO - NOTARIO